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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 1215

AMERICAN CANYON COUNTY WATER DISTRICT, a County Water District and a public corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNA,
Appellee.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNA,

Appellee.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

Appellant, American Canyon County Water District, appeals from the judgment of the Supreme Court of the State of California, entered October 7, 1965, denying a Petition for Writ of Review from orders of the Public Utilities Commission of the State of California (hereinafter referred to as PUC) dated October 13, 1964, October 30, 1964 and December 30, 1964. The effect of the PUC

orders was to authorize the sale by California-Pacific Utilities Co. (hereinafter referred to as Cal-Pac) of the Napa Junction public utility water system to the City of Napa (hereinafter referred to as City) over the protest of appellant and other individuals and organizations. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The Supreme Court of the State of California rendered no opinion and its orders are unreported. Its Order denying a petition for Writ of Review is attached hereto as Appendix A. Its Order Denying a Petition for Rehearing is attached hereto as Appendix B.

Decision No. 68010 of the PUC is reported at 63 Cal PUC 439 (1964). A copy is attached hereto as Appendix C. Decision No. 68108 of the PUC, is reported at 63 Cal PUC 506 (1964). A copy is attached hereto as Appendix D. Decision No. 68404 of the PUC is reported at 64 Cal PUC 135 (1965). A copy is attached hereto as Appendix E.

JURISDICTION

This action commenced with an application to the PUC filed by Cal-Pac and City for authority to transfer the public utility water system of Cal-Pac located in an unincorporated area known as Napa Junction, in the State of California, to City, pursuant to California Public Utili-

ties Code § 851. Appellant which is a public water district protested the application as contrary to the interests of the members of the public resident in the Napa Junction area. Most of Napa Junction is within the corporate boundaries of appellant.

Decision No. 68010, granting the application subject to certain conditions, was issued by the PUC on October 13, 1964.

The PUC in that Decision stated the authority to transfer would not be effective "until the City of Napa files with the [Public Utilities] Commission a stipulation that, as to the service, rules and rates it will apply in the service area of the system herein authorized to be transferred, it will not discriminate between service rendered outside the city limits of Napa and service rendered within said city limits, except insofar as it may adjust such outside rates and charges to offset any reasonable tax burden sustained by water users within the city in providing for the operation of the municipal water system."

Decision No. 68108 was issued by the PUC October 30, 1964. It "amended" the language of Decision No. 68010 above quoted so that the authority granted would not be effective "until the City of Napa files with the [Public Utilities] Commission a stipulation that, as to the service, rules and rates it will apply in the service area of the system herein authorized to be transferred, it will not unfairly or unreasonably discriminate between service rendered outside the city limits of Napa and service rendered within said city limits." It further provided that "[t]he date of this first Supplemental Order shall be the date hereof."

Decision No. 68108 was issued without notice or opportunity to be heard being afforded appellant. California Public Utilities Code § 1731 provides in relevant part that "No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the Commission for a rehearing." When the amending Decision No. 68108 was issued, three days remained under the terms of the earlier Decision No. 68010 within which appellant would have had the right to file petition for rehearing and preserve its right to review by application for rehearing. Appellant received actual notice of the amendment when only two days remained. Such time was in fact insufficient for appellant to prepare and file a petition for rehearing. Therefore, on November 19, 1964 appellant filed with the PUC a petition to rescind, alter or amend the PUC's decision, as amended.

On December 9, 1964 the PUC issued Decision 68319, reopening the matter for the limited purpose of hearing oral argument.

On December 30, 1964, the PUC issued Decision No. 68404, denying appellant's petition to reopen.

The PUC's opinion in Decision No. 68404, *inter alia,* concluded that Decision 68108 did not change, but merely clarified the original purport of Decision No. 68010.

On January 8, 1965, appellant petitioned for rehearing of Decision No. 68404 by the PUC, within time to preserve its right to court review, alleging, *inter alia,* that the decision in Decision No. 68010 as amended by Decision No.

68108, deprived appellant of property without due process of law in violation of the California and United States Constitutions.

Rehearing was denied by the PUC in Decision No. 68700 on March 9, 1965.

Thereafter appellant filed a petition for Writ of Review in the Supreme Court of the State of California on April 8, 1965.

The grounds on which review was sought included a disputed interpretation of California law made by the PUC, violation of the California statutory requirement of explicit findings,[1] and the constitutional ground that the decisions deprived appellant of Due Process and Equal Protection of the Laws, guaranteed by the Fourteenth Amendment of the United States Constitution.

By its order of October 7, 1965, the Supreme Court denied the petition for Writ of Review without opinion.

Appellant filed its petition for rehearing in the Supreme Court of the State of California on October 22, 1965. In this petition the question was explicitly raised whether the PUC should not have granted reopening as a matter of law because of the insufficient time given appellant to petition for rehearing before the PUC after amendment of its order.

The California Supreme Court denied rehearing, once more without opinion, on November 3, 1965.

Appellant filed notice of appeal to this Court on January 28, 1966.

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[1]California Pub. Util. Code § 1705.

The Supreme Court of the State of California, by order of March 29, 1966, extended the time for docketing the appeal in this Court to and including April 11, 1966.

This Court has jurisdiction of this appeal pursuant to 28 USC § 1257(2), since appellant raised the question of the invalidity of the actions of the PUC under the Constitution of the United States as well as under California law, both before the PUC and in the Supreme Court of the State of California, and the latter Court's decision necessarily ruled in favor of constitutional validity of said actions.

The following decisions uphold the jurisdiction of this Court to review the judgment in this case: *Atchison, T & SF R Co. v. PUC,* 346 US 346, 98 L.Ed. 51 (1953), *Live Oak Association v. Railroad Commission,* 269 US 354, 70 L.Ed. 305 (1926); *Lathrop v. Donohue,* 367 US 820, 6 L.Ed. 2d 1191 (1961).

STATUTES INVOLVED

Public Utilities Code of the State of California §§ 851 (authority from PUC to sell utility property), 1705 (intervention), 1757 (court review), and 1760, as amended, (scope of review) are set forth in Appendix F.

QUESTIONS PRESENTED

1. Whether the action of the PUC in Decision No. 68010, as amended and supplemented by Nos. 68108 and 68404, was based on no relevant evidence, failed to apply

the statutory standard of public interest which it purported to apply, and in fact decided the matter on no rational basis whatsoever, so as to deprive appellant of property without due process of law.

2. Whether the action of the PUC in the Decisions above cited deprived appellant of property without due process of law when the findings of fact and law contained in such decisions are insufficient, unrelated to the evidence, in conflict with undisputed evidence, and reveal no suggestion of a basis for the decision rationally related to the PUC's statutory function in transfer applications.

3. Whether California law, if it has denied appellant any right of review under the circumstances of this case, thereby has denied appellant equal protection of law and deprived it of property without due process of law.

STATEMENT

Appellant is a public corporation organized under the laws of California,[2] to provide water, sewer, and other services within and without the area of its corporate limits. Its territory is located in the area of Napa County, California, just south of the City of Napa, known as Napa Junction.

At present public utility water service is provided in Napa Junction by means of a water system owned by Cal-Pac, and operated by City under contract with Cal-Pac.

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[2]See pages 10-12 where the nature of a County Water District is discussed at length.

On September 12, 1963, Cal-Pac and City filed a joint Application, No. 45761, with the PUC, seeking authority to transfer the water system of Napa Junction from Cal-Pac to City. Hearings were held in March and April, 1964, at which appellant intervened as a protestant to the proposed transfer. Other protestants included the County of Napa, the American Canyon Fire District, the Southern Napa Association, the Napa County Farm Bureau, the California Farm Bureau Federation, and the Angwin Chamber of Commerce.

After the hearings, in accordance with PUC practice briefs were submitted by the parties.

October 13, 1964, the PUC issued its Decision No. 68010, granting the application of Cal-Pac and City. Because of the explicit condition put on the authority granted, to the effect that rates would be the same as for residents of the City, except to the extent required to reflect the tax differential, appellant concluded after consulting its counsel that there would be no need to appeal.

On October 30, 1964, the PUC issued Decision No. 68108, amending its earlier order. The changed language is set forth above, at page 3. This change was made without notice or hearing, and was made effective immediately.

Appellant would have sought rehearing of the Decision No. 68010 as now amended by No. 68108, but was afforded insufficient time to consult with counsel as to the purport of the amended language and prepare and file a petition for rehearing, since only two days remained within which to file for rehearing when it received actual notice of the change.

On November 19, 1964, appellant filed a Petition to Rescind, Alter or Amend the Decision, objecting to the changed language. The PUC held a hearing for the limited purpose of hearing oral argument on the changed language. Thereafter, in its Decision No. 68404, the Commission declared that the change had been one of clarification, not amendment, and that it had intended to allow differentiation between Napa Junction and other water customers of City on grounds other than tax burden.

Appellant petitioned for rehearing, was denied rehearing in Decision No. 68700 of the PUC, and thereafter sought a Writ of Review from the Supreme Court of the State of California.

That Court denied the petition for a Writ on October 7, 1965, and denied rehearing on November 3, 1965.

Appellant has initiated proceedings to acquire the Napa Junction water system by eminent domain, seeking valuation of the system from the PUC in a petition filed June 8, 1964, and condemnation in a suit filed in Napa County Superior Court in early 1965. Appellant has been informed that judgment will be entered against it in the condemnation suit, pursuant to a motion for summary judgment filed by City and Cal-Pac. Appellant intends to appeal such judgment when it is entered. One of the grounds for granting of summary judgment against appellant in that suit was the fact that City claimed an equitable interest in the water system. The Superior Court thought such interest rendered the property proof from condemnation under California law. Thus, if the order of the PUC is allowed to stand, it may prevent the

inhabitants of Napa Junction, the constituents of appellant, from ever controlling the water system which serves them. Therefore, the residents of Napa Junction are entitled to have the application for transfer of the Napa Junction system adjudicated with procedural due process.

APPELLANT HAS STANDING TO APPEAL

Appellant is a person whose property has been taken, and who has been deprived of equal protection of the laws within the meaning of the 14th Amendment, Section 1, Constitution of the United States.

Corporations are persons protected by the Due Process and Equal Protection Clauses. *Wheeling Steel Corporation v. Glander,* 337 US 562, 574, 93 L.Ed 1544 (1949) (equal protection); *Santa Clara County v. SPRCo,* 118 US 394, 396, 30 L.Ed. 118 (1886) (equal protection); *Minneapolis and St. L. R. Co. v. Beckwith,* 129 US 26, 28, 32 L.Ed. 585, 586 (1889) (due process).

The reason this is so is that the corporate entity represents the collective interests of all the individuals who participate in it. As Justice Jackson said in *Joint Antifascist Committee v. McGrath,* 341 US 123, 187, 95 L.Ed. 817, 862 (1951): "The only practical policy when people pool their capital, their interests, or their activities under a name and form that will identify collective units, often is to permit the association or corporation in a single case to vindicate the rights of all."

Appellant, while a public rather than a private corporation, comes within the rule. County water districts in

California are indistinguishable in principle from private corporations. They are formed at the instance of the electors, California Water Code §§ 30200-320. As with private corporations, the Secretary of State issues a certificate of incorporation, Water Code § 30322, and the formation of the District is recorded in the office of the county recorder in which the District is situated, Water Code § 30321. *Cf.* Calif. Corp. Code § 312. Directors are elected by the electors within the District from among themselves, Water Code §§ 30294, 30500, 30730-815, except where appointment is allowed to fill a vacancy or avoid an uncontested election. Water Code §§ 30504, 30815-817. A District is perpetual, Water Code § 31002, and has broad powers. See Cal. Water Code §§ 31000-31187. Inclusion in and exclusion of land from the District are done by the Board of Directors, Water Code §§ 32222, 32441, but exclusions are subject to a referendum of District Voters, Water Code § 32244. Consolidation of Districts with other public corporations, and dissolution, require a vote of electors. Water Code §§ 32697, 32893.

Districts have, it is true, such attributes of the sovereign as the eminent domain power, Water Code § 31044. In California, however, all persons, natural or juridical, are agents of the State to take property by eminent domain for public uses. California Civil Code § 1001.

Such Districts are basically corporations, not organs of the State, and are no more subject to loss of existence because of a changed law than any juridical person.

The cases holding that political subdivisions, at least ones of such autonomous character as appellant, may not

assert constitutional safeguards are inconsistent with cases which allow organizations to assert collectively the rights of their owners or members, or in this case constituents, to due process and equal protection of law. One of these rights surely is the right to the opportunity to pursue the corporate purposes in a climate of procedural fairness. *Joint Antifascist Committee v. McGrath, op. cit. supra; cf. Pierce v. Society of Sisters,* 268 U.S. 510, 69 L.Ed. 1070 (1925). Surely infringement of the rights of those who choose to form a County Water District rather than a mutual water company, *cf.* Cal. Public Utilities Code § 2725, is no more a "political" question because of that choice.

Appellant has rights of property which have been infringed. It is asserting its own right to exist and the rights of its constituents, the inhabitants, property owners and voters of Napa Junction, to provide themselves with water through use of a public corporation controlled by themselves. The projected transfer of the Napa Junction system to City may well make it impossible for appellant or its constituents to achieve this goal. Appellant and its constituents will instead be provided with water service by a City in whose administration they have no voice and whose rates are not subject to administrative control. California law may well be that the District may not acquire the system from City by eminent domain. The State in such circumstances can proceed only within the range of due process and equal protection of law. *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L.Ed. 1070 (1925).

THE QUESTIONS ARE SUBSTANTIAL

1. Transfer Authorization Was Not Based on Relevant Evidence and Violated Due Process.

The PUC's action was arbitrary and unfair. If it found that the public interest warranted the transfer, it did so against the overwhelming weight of the evidence. If it did not find that public interest warranted the transfer, but authorized it anyway, it acted contrary to the law in that it followed no discernible standard, and made no sufficiently explicit findings which might justify its actions.

The obvious legislative purpose of Cal. Pub. Util. Code § 851 in giving the PUC jurisdiction to approve or forbid transfers of public utility property under its jurisdiction is to prevent the frustration of the PUC's regulatory powers and protect the public interest. The PUC is bound by California law to apply the standard of public interest in exercising its jurisdiction under § 851 as in all phases of its jurisdiction. *Sale v. Railroad Comm.*, 15 Cal. 2d 612, 104 P. 2d 38, 42 (1940). The PUC has in the past consistently recognized its role under § 851 in forwarding that public purpose. See e.g., *Richmond and San Rafael Ferry and Transp. Co.*, 52 Cal. PUC 420 (1953); *Sale v. Railroad Comm., op. cit.*

The danger of frustration of the PUC's role of protection of the public is particularly great when application is made to transfer public utility property to a municipality, since municipalities are not subject to PUC regulation, nor in fact are their rates set by any agency other than themselves. The PUC has heretofore carefully reviewed transfers which will result in a municipality's serving customers outside its boundaries, who will have no

choice in municipal affairs. *See, e.g., Excelsior W. and P. Co.*, 27 C.R.C. 544 (1926). *Cf. Henderson v. Oroville-Wyandotte Irr. Dist.*, 213 C. 514, 2 P. 2d 803, 809 (1931). The instant case involved a proposal to transfer an entire water system, entirely outside City's boundaries, to City. *Prima facie,* it would have seemed applicants for authority to effect such a transfer should have borne a large burden to establish that the transfer would not be detrimental to the interests of the public concerned: the residents of Napa Junction. This was all the more true, because those residents, through a Water District they had formed, and through other community organizations, vigorously asserted their desire that the transfer not be allowed, and that they be allowed the chance to acquire the system.

In fact, however, the evidence introduced before the PUC by applicants did not justify any finding that the rates applied by City in Napa Junction would be reasonable, or that any benefits would ensue to transferor, its remaining customers, or transferee and its customers. On the other hand, the PUC was made aware of the possible adverse effects to the customers of the system in question. Such adverse effects included the fact City had higher rate levels than Cal-Pac, that Napa Junction customers would have no voice in City affairs, and that the sale price would inflate the base on which rates would be set.

In so far as the opinion of the PUC may reveal its *modus decidendi,* far from considering that applicants had to discharge a burden of proof as to the public interest of their proposal, the PUC considered that protestants were required to carry the burden of establishing that

it would *not* be in the public interest. The opinion largely consists of a series of refutations of arguments and evidence offered by protestants, including appellant. The opinion offers little more to justify the transfer than that applicants had a contract of sale and it would be convenient for them to be allowed to consummate that sale.

Appellant believes that the PUC clearly failed to discharge its duty under California law to protect the public interest. That question, however, is foreclosed in this Court by the decision of the Supreme Court of California. Appellant asks this Court to hold that, if the law of California be that the PUC may authorize a sale on the evidence it had before it, purporting to find that sale in the public interest, such California law in this respect deprives appellant of property without due process of law. If, which amounts to the same thing, California law allows the PUC to authorize a transfer without applying any standard, or without declaring what that standard is, it is equally void because equally arbitrary.

An order of a state administrative tribunal based on evidence which clearly does not support it is "an arbitrary act" against which this Court will afford relief, as a matter of due process. *Northern P.R. Co. v. D.P.W.*, 268 U.S. 39, 45, 69 L.Ed. 836, 841 (1925).

The opinion of the PUC purports to deal with the issue of public interest. Its findings of fact include the finding that "The proposed transfer of the Napa Junction system . . . is not adverse to the public interest." That finding bears no relation to the evidence adduced before the PUC, much of which is not discussed in the opinion.

2. Transfer Authorization Was Not Based on Findings Which Satisfy Due Process.

The decision is also arbitrary and unfair in that it does not discuss the evidence and does not make subsidiary findings from which a court could establish that there was a rational basis for the decision.

In many past decisions the Commission had recognized the relevance in transfer applications of the fact customers would be subjected to the unregulated rates of municipal bodies of which they were not members, and the Supreme Court of California had agreed that this concern was valid and in fact required by the law. *Sale v. Railroad Commission, op. cit. supra; Henderson v. Oroville-Wyandotte Irr. Dist., op. cit. supra.*

Yet in this case the opinion of the PUC states at one point that City would be "subject to the same public utility duties and obligations" as Cal-Pac. It is indisputable that City would *not* be subject to the strict rate regulation of the PUC if the transfer were authorized. Moreover, the City would be free to set its rates based on the price *it* paid for the system, something a regulated operator could not do.[3]

The opinion then asserts that protestants merely prefer one of "two adequate modes of protecting the rights of customers in the Napa Junction area," impliedly finding protection of rights by a suit to establish the unreasonableness of rates by the aggrieved consumer an adequate means of rate regulation.

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[3]Cal. PUC, Uniform System of Accounts for Water Utilities, (Class A, B, C), page 39. See *Cal. Water & Tel. Co.*, Decision No. No. 70418, mimeo. page 9, ____ Cal. PUC ____ (1966).

This is clearly in conflict with the existing state of affairs, recognized by the PUC in the past in the following terms:

> ". . . [i]t is the duty of the Commission in passing upon requests for the transfer of public utility properties to an entity such as an irrigation district, adequately to safeguard and protect the rights of any consumers remaining outside. . . . This is particularly true because the Commission possesses no control or jurisdiction over irrigation districts, and there exists no state authority for the fixing of rates for such outside service." *Excelsior Water and Power Co.*, 27 C.F.C. 544, 545 (1926).

In that case the transfer was authorized on the explicit condition that no more than an 8% rate of return be earned on such service to outside consumers. This is quite a different approach from the vague adjuration to be reasonable used in the present case. In other cases the PUC has imposed, and courts have enforced, the requirement that outside rates be *identical* with those charged inside the muncipality. See *Rutherford v. Oroville-Wyandotte Irr. Dist.*, 218 Cal. 242, 22 P. 2d 505 (1933). *Henderson v. Oroville-Wyandotte Irr. Dist., op. cit. supra.*[4]

California Public Util. Code § 1705 requires that decisions of the PUC contain findings on all material issues. Appellant argued before the Supreme Court of California that the decision in this case did not meet the require-

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[4]An indication of the lack of reasoned basis for the result reached revealed by the opinion of the PUC is that the two cases cited immediately above were cited by the PUC in Dec. No. 68010 as showing the adequacy of a suit to enjoin unreasonable rates, when those cases were brought on entirely different theories and in fact support the position of protestants.

ments of that Section. That question is not now open. Appellant believes, however, that a decision which fails so completely to discuss the evidence and applicable law in a way which would reveal a rational application of law to facts, a rational attempt to operate within its broad discretion in a way which carries forward some articulated view of its statutory functions, or any rational basis for its result, must fail to meet minimum standards of procedural fairness. To rule otherwise would be *de facto* to authorize decision without hearing and decision without basis in fact. *Florida v. U.S.*, 282 U.S. 194, 75 L.Ed. 291 (1931); *Saginaw Broadcasting Co. v. F.C.C.*, 96 F. 2d 554, 559 (D.C. Cir., 1938). *Cf. Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L.Ed. 446 (1935).

3. Right of Review Was Denied in Violation of Due Process and Equal Protection.

The originial Decision of the PUC in this matter, No. 68010, on its face imposed a condition, quoted above at p. 3, requiring City to serve Napa Junction at the same rate applicable to service within the City's boundaries, modified only to recognize the absence of a city tax upon residents in Napa Junction. The Decision was changed *ex parte* by Decision No. 68108,[5] which changed the condition from one prohibiting *any* difference in rates except insofar as tax burdens might justify it, to one prohibiting "unfair or unreasonable" discrimination. This amendment in effect eliminated the condition. See *Durant v. City of Beverly Hills*, 39 Cal. App. 2d 133, 102 P. 2d 759

[5]Compare Cal. Pub. Util. Code § 1708, which requires hearing before amendment of orders.

(1940). Decision No. 68108 was issued not only *ex parte* but only three days prior to the effective date of Decision No. 68010.

Though it was appellant's position that such a condition as that in Decision No. 68108 was inadequate to protect its interest and rendered the transfer clearly contrary to the public interest, the two days afforded appellant after notice of the change were insufficient to allow a petition for rehearing. Under Cal. Pub. Util. Code § 1731, a petition for rehearing before the effective date is necessary to preserve the right to review.

PUC in its answer to appellant's petition for Writ of Review to the Supreme Court of California asserted that, under such circumstances, appellant was precluded from seeking review of PUC Decisions Nos. 68010 and 68108, but only might seek review of Decision No. 68404, which under the circumstances would mean appellant was limited to the assertion that the PUC had abused its discretion in refusing, in Decision No. 68404, to reopen the matter.

The Supreme Court of the State of California wrote no opinion in denying appellant's petition. It may have decided that appellant had in fact lost its right to review because it filed no timely petition for rehearing of Decision No. 68010. If it did so, this was a deprivation of property without due process of law and a denial of equal protection of law.

A. Due Process Requires the Right to Judicial Review of Constitutional Objections to Administrative Decisions.

It is axiomatic that there is a right to review of constitutional objections to an administrative decision. "[T]here is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." *St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38, 52, 80 L.Ed. 1033, 1041 (1936), cited in *Estep v. U.S.*, 327 U.S. 114, 127, 90 L.Ed. 567, 575 (1946). The circumstances under which appellant was deprived of its right to review, involved procedure which did not give appellant a fair chance to preserve the right. Such procedure in itself should be considered in violation of due process. *General Oil v. Crain*, 209 U.S. 211, 52 L.Ed 754 (1908). A litigant must be given "a reasonable opportunity to have the issue . . . heard and determined . . ." *Central Union T. Co. v. Edwardsville*, 269 U.S. 190, 194-95, 70 L.Ed. 229, 231 (1925).

B. Due Process Requires the Right to Judicial Review of All Administrative Decisions.

Whether or not appellant in fact had valid constitutional objections as stated in questions 1 and 2, *supra*, it is submitted that a total deprivation of review is a denial of due process. While this Court has never held denial of any review to be a denial of due process, the Court in dicta has suggested that judicial review *is* required by due process. *Estep v. United States, op. cit.* 327 U.S. at 120, 90 L.Ed. at 572. See *Ng Fung Ho v. White*, 259 U.S. 276, 66 L.Ed. 938 (1922), Jaffe, The Right to Judicial Review II, 71 Harv. L. Rev. 769, 795-814 (1958).

C. Appellant Has Been Deprived of Equal Protection.

When the state provides a procedure for review, the state must follow that procedure with fairness, and not arbitrarily deprive some litigants of such review in a way which denies them equal protection of law and due process insofar as it requires equal protection. See *Lane v. Brown*, 372 U.S. 477, 9 L.Ed.2d 892 (1963); *Draper v. State*, 372 U.S. 487, 9 L.Ed. 2d 899 (1963); *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891 (1956).

CONCLUSION

The questions presented by this appeal are substantial. The Supreme Court of the State of California issued no opinion. It may either have disposed of the case after considering appellant's constitutional objections to the conduct of the hearing, or may have disposed of the case by finding that appellant had lost its right to any review. In either event substantial questions of infringement of constitutional rights are involved. Probable jurisdiction should therefore be noted.

Respectfully submitted,

BORIS H. LAKUSTA,
Attorney for Appellant.

ROBERT H. ZELLER,
GRAHAM JAMES & ROLPH,
E. MYRON BULL, JR.,
RICHARD A. EASTMAN,
Of Counsel.

(Appendices Follow)

Appendix A

S.F. No. 22015

In the Supreme Court of the State of California
In Bank

American Canyon County Water District

v.

Public Utilities Commission

ORDER DENYING WRIT OF REVIEW

Petition for writ of review DENIED.

Traynor,
Chief Justice.

Filed Oct. 7, 1965,
William I. Sullivan, Clerk,
By Bishel,
S. F. Deputy.

Appendix B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Nov. 3, 1965

Dear Sir: I have this day filed Order

Rehearing Denied

In re: S.F. No. 22015 Amer. Canyon Co. Water Dist. vs. PUC etc. et al,

Respectfully

William I. Sullivan
Clerk

Appendix C

ds

From: Public Utilities Commission
State of California
State Building, Civic Center
San Francisco 2, Calif.

Decision No. 68010

Before the Public Utilities Commission
of the State of California

Application No. 45761
(Filed September 12, 1963)

In the Matter of the joint application of California-Pacific Utilities Company and City of Napa for an order authorizing California-Pacific Utilities Company to sell its Napa Junction Water System to the City and to discontinue its public utility service in the County of Napa.

Orrick, Dahlquist, Herrington & Sutcliffe, by James F. Crafts, Jr., for California-Pacific Utilities Co.; Bacigalupi, Elkus & Salinger, by Claude N. Rosenberg, for City of Napa, applicants.

Daniel K. York, for County of Napa; Robert H. Zeller, for American Canyon County Water District; William L. Knecht, for Napa County Farm Bu-

reau and California Farm Bureau Federation; Orville B. Nelson, for Angwin Chamber of Commerce; David R. York, for American Canyon Fire District and Southern Napa County Association, protestants.

Colonel Roy L. Jones, for Upper Valley Associates, interested party.

James F. Haley, for the Commission staff.

Oct. 13/64

OPINION

This is a joint application filed by California-Pacific Utilities Company (hereinafter referred to as California-Pacific) and the City of Napa (hereinafter referred to as City) in which the applicants seek an order authorizing California-Pacific to sell its Napa Junction Water System to City and to discontinue its public utility water service in Napa County.

A duly noticed public hearing was held in this matter before Commissioner Grover and Examiner Jarvis at Napa on March 25, 26 and 30 and April 10, 1964. The matter was submitted subject to the filing of a late-filed exhibit and briefs which have been received.

The Napa Junction system is located in an unincorporated area south of City. It had 865 service connections in February of 1964. The system was formerly operated as a unit which also included California-Pacific's Benicia-Solano Water System. In Decision No. 63326 in Application No. 43973, issued on February 26, 1962, the Commission authorized the transfer of the Benicia-Solano

portion of the system to the City of Benicia. California-Pacific has no independent source of water supply for the Napa Junction system. The water distributed in the system is purchased from City under a contract which expires in 1970. On September 3, 1963, City and California-Pacific entered into the agreement here under consideration whereby City agreed to purchase the Napa Junction system for $260,000, subject to certain adjustments. On May 7, 1963, the electorate of City approved a $330,000 bond issue which included funds to be used for acquiring the system.

At the time the Benicia-Solano system was sold to the City of Benicia, the California-Pacific employees who operated the entire system became employees of the City of Benicia. At the same time the City of Benicia entered into an agreement with California-Pacific whereby the City of Benicia agreed to take over the operation and normal maintenance of the Napa Junction system. The operation and maintenance contract had a provision which permitted termination by either party upon the giving of appropriate notice. The City of Benicia gave the requisite notice and terminated the agreement as of March 31, 1964. California-Pacific and the City of Napa entered into a similar agreement commencing April 1, 1964. The agreement has a 90-day termination provision. City has indicated that it considers this agreement as an interim measure pending the outcome of this proceeding. City will terminate the agreement if this application is not granted. In such event, it will become necessary for California-Pacific to hire personnel to operate and maintain the Napa Junction system.

The following entities appeared at the hearing and protested the granting of the application: American Canyon County Water District (hereinafter referred to as American Canyon), County of Napa (hereinafter referred to as County), American Canyon Fire District (hereinafter referred to as Fire District), Southern Napa County Association hereinafter referred to as Association), Napa County Farm Bureau and California Farm Bureau Federation (hereinafter jointly referred to as Farm Bureau) and the Angwin Chamber of Commerce.

The primary reasons given by the protestants for opposing the application are that, if it be granted, City would be in a position to control the development of southern Napa County, the water rates in the Napa Junction area would be increased, the residents of the Napa Junction area would have no effective means to protect themselves against possible future arbitrary action respecting rates or service by City, American Canyon should be the entity to serve the area and development of a county water plan would be inhibited. In addition to the general position of all the protestants—that the application be denied—County requested that the proceeding be delayed for a period of three years to permit American Canyon, if possible, to acquire the system. American Canyon takes the position that, if the transfer is authorized, the Commission should make certain conditions, alleged to be in the public interest, a prerequisite to such transfer.

Protestants contend that if City acquires the Napa Junction system it would control the development of southern Napa County. It is argued that by exercising

such control City could, by withholding water service, thwart developments which would benefit the area or the county as a whole. City asserts that its record over the years demonstrates that it has always cooperated in helping with the development of the Napa Junction area, as indicated by City previously revising its water supply contract with California-Pacific to provide the additional water necessary to enable a new industrial plant to be located in the area. City and California-Pacific contend that, regardless of the question of the City's good faith interest in the development of the Napa Junction area, this point is not relevant to the proceeding because City would take the system subject to the same public utility obligations presently resting upon California-Pacific. The Commission believes this contention to be correct and determinative of this issue.

If City acquires the Napa Junction system it will hold the system subject to the same public utility duties and obligations now imposed on California-Pacific. (*South Pasadena v. Pasadena Land & Water Company,* 152 Cal. 579, 593; *People ex rel. City of Downey v. Downey County Water District,* 202 Cal. App. 2d 786, 796-97; *Erwin v. The Gage Canal Co.,* 226 Adv. Cal. App. 253.) Among these obligations is one to make reasonable extensions of water service in the area. (*Lukrawka v. Spring Valley Water Co.,* 169 Cal. 318.)

At the hearing various protestants expressed the concern that if City acquired the Napa Junction system it would require prospective future water users to execute agreements not to oppose annexation as a condition for receiving water service. All the parties agree that at the

present time, as a practical matter, it is not possible for City to annex any of the area encompassed in the Napa Junction system. The record discloses that City has by official action delineated an area considered to be annexable; that before water service is extended to anyone in the annexable area he is required to execute an agreement not to oppose annexation; that the Napa Junction system is outside the annexable area, and that no annexation agreement would be required for service and none is ever contemplated. We need not dwell at length upon this point. The evidence shows that the fears of the protestants are not justified. In addition, even if City were to attempt to change its position on this score it could not do so. Under the authorities heretofore cited, City could not impose a more onerous burden for receiving water service than now is required by California-Pacific. (*South Pasadena v. Pasadena Land & Water Company, supra; People ex rel. City of Downey v. Downey County Water District, supra; Erwin v. The Gage Canal Co., supra.*)

It is clear from the foregoing that if City acquires the Napa Junction system it will have the same duties and obligations now imposed on California-Pacific, and City could not adversely affect the development of the area by arbitrary manipulation of the water supply.

Association and other protestants contend that the application should not be granted because if it is granted the customers of the Napa Junction system will have their water rates immediately increased. The record indicates that a customer using an average amount of water (approximately 1,200 cubic feet per month) pays $5.91

per month to California-Pacific for water service. City has two rate schedules for water service; an "inside" rate which applies to water users whose service connections are within the city limits and an "outside" rate which applies to water users whose service connections are outside of the city limits. The outside rate is higher than the inside rate. City presently has approximately 2,000 customers outside the city limits and the outside rate is uniformly applied to them. City proposes to apply the outside rate to the Napa Junction system. On February 17, 1964 the Napa City council passed a resolution which states that:

> "BE IT RESOLVED, by the City Council of the City of Napa, that the City of Napa agrees that in the event of its acquisition of the Napa Junction Water System which is presently owned by California-Pacific Utilities Company, the City will assume and discharge all public utility obligations of California-Pacific Utilities Company relating to water service from said water system and will not unfairly discriminate in the matter of rates or service between consumers served from said water system and other persons receiving water service from the City of Napa."

If the outside rate is applied, a customer using an average amount of water would pay a monthly bill of $6.91.

City and California-Pacific contend that the foregoing comparison of rates should not receive any weight because California-Pacific's present rates are unreasonably low. California-Pacific states that if this application is denied, it will immediately apply to the Commission for authority to increase its rates. At the hearing California-Pacific

introduced evidence which indicated that it considered a 6.5 percent rate of return reasonable for the Napa Junction system; that in 1963 its rate of return was 3.98 percent; that if the operative and maintenance contract is terminated by City and California-Pacific must itself operate and maintain the system its rate of return would be 2.96 percent and that if its rates were increased to provide for a 6.5 percent rate of return, the monthly charge to a customer using an average amount of water would be $7.57.

While the present difference in rates between City's outside rates has some significance, it is not critical. If the application is not approved and City terminates the operating and maintenance contract, California-Pacific would need to employ a staff to operate the Napa Junction system, thereby increasing operating expenses. While we do not pass upon the specific figures proffered by California-Pacific, it appears that if it retains the system some rate adjustment might be warranted. Furthermore, the contract between City and California-Pacific for supplying water to the Napa Junction system expires in 1970. If the contract is renewed the price of water may be increased. If the contract is not renewed, or if there is any question about its being renewed, California-Pacific will be compelled to seek, or develop, another water supply, if any is available. The present City outside rate has not been shown to be unreasonable. The indications are that the differential between it and the present California-Pacific rate will be diminished if not eliminated in the future. If the Napa Junction system is transferred to City the people living in the area will be assured of

adequate water service for the foreseeable future. The Commission deems this point more significant than the present difference in rates heretofore discussed.

Protestants next contend that if the Napa Junction system is transferred to City the residents of the area would have no effective means of protecting themselves against possible future arbitrary action by City relating to rates or service. It is argued that the system would be controlled by the Napa City Council, and that the Napa Junction residents would have no voice in selecting members of the council. As indicated, City would take the system subject to the public utility duties and obligations of California-Pacific, and no action by the city council could alter or change these duties and obligations. It is true that in the first instance matters relating to water service would be passed upon by City. However, these actions are subject to review by the superior court. (*Fellows v. City of Los Angeles,* 151 Cal. 52; *Rutherford v. Oroville-Wyandotte Irr. Dist.,* 218 Cal. 242; *Henderson v. Oroville-Wyandotte Irr. Dist.,* 207 Cal. 215; *Durant v. City of Beverly Hills,* 39 Cal. App. 2d 133.)

Association contends that the Napa Junction system should not be transferred because it would prefer regulation by this Commission to review of service and rate matters by the superior court. A mere preference between two adequate modes of protecting the rights of the customers in the Napa Junction area is entitled to little weight, when considered in the light of the entire record developed herein.

American Canyon contends that it is the entity which should eventually provide water service to the area. It

was formed in 1961 primarily to provide sanitation facilities. The boundaries of American Canyon are not as extensive as those of the Napa Junction system, but it has authority to render service outside of its boundaries. At the hearing evidence was adduced to indicate that at that time the district had no funds to provide for the engineering or construction of any facilities; that a bond issue to provide for $345,000 of general obligation bonds to be used only for the construction of sewage facilities had failed to pass in November of 1962; that certain lands had subsequently been eliminated from the district, and that another bond election to provide funds for the construction of sewage facilities was pending before the electorate.

There is conflicting evidence in the record, but it indicates that the tax rate in the American Canyon area is either $9.69 or $10.64 per $100 of assessed valuation. Witnesses on behalf of the district testified that in order to develop a water system American Canyon would attempt to get federal funds to provide for an engineering report and feasibility study to provide water service for the district and that if water service were deemed feasible, American Canyon would attempt to get a loan under the Davis-Grunsky Act from the State Department of Water Resources. American Canyon admits that it would not construct any water distribution facilities initially. It proposes to take over the California-Pacific facilities and then expand the distribution system. There is, however, considerable doubt whether Davis-Grunsky funds, if available, can be used for the purchase of an existing private public utility water system. In addition, the consulting

engineer who testified in behalf of American Canyon indicated that no work on a specific water system had been done; that he had no idea of the estimated cost of constructing a water distribution system for the district; that he had not developed any preliminary cost estimates of the capital required for American Canyon to be in a position to render water service; and that he could not make any assumptions respecting prospective rates for water service because there is no certain source of water for the district at the present time. A director of American Canyon also testified that if a Davis-Grunsky loan were obtained, it would be necessary for the district to secure a 10-year moratorium and pay only the interest until the district became large enough to make payments on the principal.

It is apparent from the foregoing that the probability of American Canyon being able to acquire the Napa Junction system in the next few years is highly speculative and conjectural. The Commission is of the opinion that such a remote possibility should not be permitted to defeat the transfer here under consideration.

Although this decision does not rely on this point, it should be noted that at the hearing City indicated that the present policy of the City is that at such time as American Canyon or an incorporated city in the Napa Junction area had an adequate separate water source and financial ability to purchase the system, City would favorably consider selling it to such purchaser.

After the matter was submitted, American Canyon filed a "Petition to Set Aside Submission and Re-Open Proceedings for the Taking of Additional Evidence". City

and California-Pacific oppose the granting of the petition. The petition avers that if the proceeding is reopened American Canyon could prove that the sewer bond election, which was pending at the time of the hearing, resulted in the electorate authorizing $275,000 in general obligation bonds for the construction of sewers, that it had filed with this Commission Application No. 46698, which is a petition of the second class setting forth the district's intention to submit to its voters a proposition to acquire the Napa Junction system and requesting the Commission to fix the just compensation under such circumstances; that the Department of Water Resources had determined that American Canyon is a public agency of the type defined in the Davis-Grunsky Act and that the project, insofar as it pertains to the replacement of old facilities and construction of new works, is an eligible project as defined in the Act.

The Commission has carefully considered the petition to reopen and finds that the evidence which American Canyon seeks to present, if established, would not affect the disposition of this matter.

Finally, protestants contend that the granting of this application would inhibit the development of a County water plan. There is no merit in this contention. It appears that there is a local controversy in Napa County involving City's participation in certain phases of the State Water Plan. County, through the Napa County Flood Control and Water Conservation District, has contracted with the State to take a maximum of 25,000 acre feet per year from the North Bay Aqueduct, which is to be constructed by 1980. County is obligated to make capi-

tal increment and transportation payments under the contract. However, the contract is not financially feasible unless City takes 50 percent of the water supplied by the State. City has not agreed to do this, and has indicated it is exploring the possibility of obtaining a different source of supply for future water needs. Also, it appears that County and the Farm Bureau gave support to the passage of the bond issue, enabling City to secure the funds to purchase the Napa Junction system, with the hope that if City acquired the system it would import water from the City of Vallejo and make City water available to other areas in the County.

The Commission is not the proper forum to resolve such disputes between City and County over water development matters. Where appropriate, the Commission will consider and give weight to the impact of a prospective transfer on the development and use of water resources in the area. This is not such a case. The record discloses that the water needs of the Napa Junction system amount to 450-500 acre feet per year. City presently supplies that amount and is obligated, under contract, to do so until 1970. Denial of this application would have no effect until at least 1970 on the source of the water supply for the Napa Junction system. It would not compel Napa to make its water available elsewhere. Denial of the application would, however, cast doubt about the future source of water for the area. Denial would also cause California-Pacific to employ personnel and perhaps make capital improvements which would not be necessary if the system is transferred to City.

Various conditions precedent requested by American Canyon if a transfer is authorized deal with matters of legal rights heretofore discussed. There is no need for such conditions. Other requested conditions are not warranted. No other points require discussion.

The Commission makes the following findings and conclusions.

Findings of Fact

1. The proposed transfer of the Napa Junction system from California-Pacific to City is not adverse to the public interest.

2. No good reason has been shown to set aside submission and reopen the proceeding.

Conclusions of Law

1. The application should be granted as hereinafter provided.

2. The "Petition to Set Aside Submission and Re-Open Proceedings for the Taking of Additional Evidence" should be denied.

ORDER

It Is Ordered that:

1. Within one year after the effective date of this order, California-Pacific Utilities Company may sell and transfer its Napa Junction Water System to the City of Napa in accordance with the terms and conditions of the "Contract of Purchase" executed by the parties on September 3, 1963, which is attached to the application as Exhibit C, as amended only with respect to termination

date. This authority shall not be effective until the City of Napa files with the Commission a stipulation that, as to the service, rules and rates it will apply in the service area of the system herein authorized to be transferred, it will not discriminate between service rendered outside the city limits of Napa and service rendered within said city limits, except insofar as it may adjust such outside rates and charges to offset any reasonable tax burden sustained by water users within the city in providing for the operation of the municipal water system.

2. On or before the actual date of transfer of California-Pacific Utilities Company shall refund all customers' deposits which are subject to refund. Within ten days thereafter, California-Pacific Utilities Company shall advise the Commission, in writing, that such refunds have been made.

3. Within ten days of the actual transfer, California-Pacific Utilities Company shall notify the Commission, in writing, of the date upon which the transfer was consummated.

4. Upon completion of the sale and transfer herein authorized and all of the terms and conditions of this order, California-Pacific Utilities Company shall stand relieved of its public utility obligations and liabilities in connection with the utility system herein authorized to be transferred.

5. The "Petition to Set Aside Submission and Re-Open Proceedings for the Taking of Additional Evidence" filed by the American Canyon County Water District is hereby denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 13th day of October, 1964.

Frederick B. Holoboff
President
Peter E. Mitchell
Everett C. McKeage
William M. Bennett

Commissioner George C. Grover, being necessarily absent, did not participate in the disposition of this proceeding.

Certified as a True Copy
Noel Coleman
Assistant Secretary
Public Utilities Commission
State of California

Appendix D

Decision No. 68108

Before the Public Utilities Commission
of the State of California

Application No. 45761

In the Matter of the joint application of California-Pacific Utilities Company and City of Napa for an order authorizing California-Pacific Utilities Company to sell its Napa Junction Water System to the City and to discontinue its public utility service in the County of Napa.

FIRST SUPPLEMENTAL ORDER

On October 13, 1964, in Decision No. 68010, the Commission authorized California-Pacific Utilities Company to sell the City of Napa certain public utility property located near but outside the city. Ordering Paragraph 1 of that decision provided:

> "1. Within one year after the effective date of this order, California-Pacific Utilities Company may sell and transfer its Napa Junction Water System to the City of Napa in accordance with the terms and conditions of the 'Contract of Purchase' executed by the parties on September 3, 1963, which is attached to the application as Exhibit C, as amended only with respect to termination date. This authority shall not be effective until the City of Napa files with the Commission a stipulation that, as to the service, rules and

rates it will apply in the service area of the system herein, authorized to be transferred, it will not discriminate between service rendered outside the city limits of Napa and service rendered within said city limits, except insofar as it may adjust such outside rates and charges to offset any reasonable tax burden sustained by water users within the city in providing for the operation of the municipal water system."

By letter, the City has now requested elimination of the reference to taxes in the language of the required stipulation. Under the doctrine expressio unius est exclusio alterius, it is suggested that this specific reference to taxes might be construed to foreclose other reasonable grounds (such as differences in cost of delivering water) for charging higher rates outside the city.

The reference to taxes had no such purpose. In this case, as well as others where a similar stipulation has been required, taxes have been mentioned simply to make sure that they would not be ignored because of the indirect relationship between taxes and utility charges. The City does not disagree with this interpretation but it does seek to remove the possibility of future misunderstanding. In the interests of clarification, a revised stipulation will be authorized.

It bears emphasis: (1) that no change in the consideration to be given any such tax burden is contemplated by the revision of language which is authorized hereby; and (2) that even without this language change, the stipulation in Ordering Paragraph 1 of Decision No. 68010 was not designed to exclude, and did not exclude, consideration of other reasonable grounds for rate differentials.

Good cause appearing, Ordering Paragraph 1 of Decision No. 68010 is hereby amended to read as follows:

1. Within one year after the effective date of this order, California-Pacific Utilities Company may sell and transfer its Napa Junction Water System to the City of Napa in accordance with the terms and conditions of the "Contract of Purchase" executed by the parties on September 3, 1963, which is attached to the application as Exhibit C, as amended only with respect to termination date. This authority shall not be effective until the City of Napa files with the Commission a stipulation that, as to the service, rules and rates it will apply in the service area of the system herein authorized to be transferred, it will not unfairly or unreasonably discriminate between service rendered outside the city limits of Napa and service rendered within said city limits.

The effective date of this First Supplemental Order shall be the date hereof.

Dated at San Francisco, California, this 30th day of October, 1964.

Frederick B. Holoboff
President
Everett C. McKeage
George G. Grover
William M. Bennett
Commissioners

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.

Certified as a True Copy
Noel Coleman
Assistant Secretary
Public Utilities Commission
State of California

Appendix E

Decision No. 68404

Before the Public Utilities Commission
of the State of California

Application No. 45761

In the Matter of the joint application of California-Pacific Utilities Company and City of Napa for an order authorizing California-Pacific Utilities Company to sell its Napa Junction Water System to the City and to discontinue its public utility service in the County of Napa.

Orrick, Dahlquist, Herrington & Sutcliffe, by James F. Crafts, Jr., for California-Pacific Utilities Co.; Bacigalupi, Elkus & Salinger, by Claude N. Rosenberg, for City of Napa, applicants.

Graham James & Rolph, by Boris H. Lakusta, for American Canyon County Water District; William L. Knecht, for Napa County Farm Bureau and California Farm Bureau Federation, protestants.

James F. Haley, for the Commission staff.

THIRD SUPPLEMENTAL ORDER

Following extensive public hearings, the Commission on October 13, 1964, issued Decision No. 68010 granting

California-Pacific Utilities Company authority to sell its Napa Junction System located near the City of Napa to the City. In accordance with Commission practice, a stipulation by the City that it will not discriminate against customers outside the City was made a condition of the transfer. Ordering Paragraph 1 of Decision No. 68010 provided:

> "1. Within one year after the effective date of this order, California-Pacific Utilities Company may sell and transfer its Napa Junction Water System to the City of Napa in accordance with the terms and conditions of the 'Contract of Purchase' executed by the parties on September 3, 1963, which is attached to the application as Exhibit C, as amended only with respect to termination date. This authority shall not be effective until the City of Napa files with the Commission a stipulation that, as to the service, rules and rates it will apply in the service area of the system herein authorized to be transferred, it will not discriminate between service rendered outside the city limits of Napa and service rendered within said city limits, except insofar as it may adjust such outside rates and charges to offset any reasonable tax burden sustained by water users within the city in providing for the operation of the municipal water system."

Thereafter, before the effective date of the decision, the City by letter requested a revision of the language of the required stipulation to make it clear that all reasonable grounds for rate differentials would be permitted and not merely the ground of municipal tax subsidy which was specifically mentioned in Ordering Paragraph 1. The subject of rate differentials was discussed in Decision No.

68010, and it was implicit in that discussion, and the Commission intended, that other reasonable grounds for such differentials (including differences in the cost of delivering water) would be proper. Accordingly, there appeared to be no reason why the language of the required stipulation should not be clarified, and the Commission on October 30, 1964, issued ex parte a First Supplemental Order (Decision No. 68108). The First Supplemental Order was not designed to change the substance of Ordering Paragraph 1, but, in the interests of clarification, a revised stipulation was authorized. The First Supplemental Order modified Ordering Paragraph 1 of Decision No. 68010 to read as follows:

> "1. . Within one year after the effective date of this order, California-Pacific Utilities Company may sell and transfer its Napa Junction Water System to the City of Napa in accordance with the terms and conditions of the 'Contract of Purchase' executed by the parties on September 3, 1963, which is attached to the application as Exhibit C, as amended only with respect to termination date. This authority shall not be effective until the City of Napa files with the Commission a stipulation that, as to the service, rules and rates it will apply in the service area of the system herein authorized to be transferred, it will not unfairly or unreasonably discriminate between service rendered outside the city limits of Napa and service rendered within said city limits."

The First Supplemental Order was made effective on the date it was issued, three days before the effective date of Decision No. 68010.

After the issuance of the First Supplemental Order, the American Canyon County Water District, a protestant in

the proceeding, filed a petition to reopen. The petition alleged that the First Supplemental Order was issued without notice and without affording the district an opportunity to be heard. The petition also alleged that, although the district was "disappointed" in Decision No. 68010, it had decided not to seek rehearing of the decision; that the revised stipulation authorized by the First Supplemental Order was more than a clarification of the original Ordering Paragraph 1, and that the district was deprived of an opportunity to petition for a rehearing of the decision as modified.

As indicated, the Commission did not consider the First Supplemental Order to be a substantive change of Decision No. 68010. However, on consideration of the petition to reopen, the Commission was of the opinion that the district should be afforded an opportunity to present argument on the subject. Therefore, the Commission on December 9, 1964, issued a Second Supplemental Order (Decision No. 68319) which stayed the operative effect of the original decision and First Supplemental Order and provided for a hearing at which the district might present argument on the First Supplemental Order and Ordering Paragraph 1 of Decision No. 68010. The district and applicants agreed to an early hearing on short notice, and a duly noticed public hearing was held before Commissioner Grover and Examiner Jarvis at Napa on December 14, 1964. The matter was submitted on that date.

At the hearing on the motion to reopen, the district requested that the proceeding be reopened for the taking of additional evidence. However, the district was unable

to point to any specific item of evidence which it could introduce if the proceeding were reopened. Since it does not know what evidence it would produce, the district cannot, and does not, allege that such evidence was newly discovered and unavailable at the time of the hearing in this matter.

We have considered the arguments made at the hearing of December 14, 1964, in light of the entire record herein, and we are of the view that our original decision, as modified by the First Supplemental Order, is in the public interest. We so find. No justification has been presented for reversing our original determination that the transfer should be authorized. Moreover, the stipulation provided for in the First Supplemental Order is in the public interest because it looks to "reasonableness" as the proper standard for the City's treatment of customers who reside beyond the City's boundaries. It would be contrary to the public interest to impose upon the transfer a condition that the City extend any unreasonable preference to outside customers.

The district has not shown that Ordering Paragraph 1 of the First Supplemental Order is more than a clarified restatement of Ordering Paragraph 1 of the original decision. The district has failed to show that it has discovered evidence which was unavailable at the time of the main hearing in the matter. The district has failed to indicate any way in which the original decision as modified is unlawful or not in the public interest.

Therefore, good cause appearing,

It Is Ordered that:

1. The petition of the American Canyon County Water District to reopen the proceeding is denied.

2. Ordering Paragraph 4 of the Second Supplemental Order (Decision No. 68319) is hereby vacated.

The effective date of this order shall be ten days after the date hereof.

Dated at San Francisco, California, this 30th day of December, 1964.

Frederick B. Holoboff
President
Peter E. Mitchell
Everett C. McKeage
George G. Grover
William M. Bennett
Commissioners

Appendix F

Public Utilities Code of the State of California

851. No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of Chapter 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapesd or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture.

Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the perform-

ance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value; provided, however, that nothing in this section shall apply to the interchange of equipment in the regular course of transportation between connecting common carriers. (Former Sec. 51(a). Amended 1951, Ch. 402; amended 1959, Ch. 1405; amended 1965, Ch. 117.)

1705. At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. The decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with

within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.